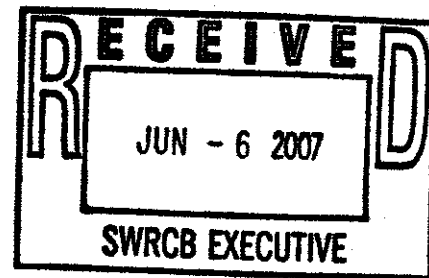


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6/19/07 BdMtg Item 10
WR Enforcement
Deadline: 6/6/07 Noon



June 6, 2007

Via Personal Delivery and Email (commentletters@waterboards.ca.gov)

Attention: Song Her, Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Re: June 19, 2007 Water Right Enforcement Workshop

To the Members of the State Water Resources Control Board:

This letter is submitted by Somach Simmons & Dunn¹ and the California Farm Bureau Federation in response to the State Water Resources Control Board's (SWRCB) Revised Notice regarding its June 19, 2007 Water Right Enforcement Workshop.

The SWRCB's Revised Notice identifies the following as an item for discussion:

The State Water Board has four potential formal enforcement options available: (1) issuance of a Cease and Desist Order, (2) issuance of an Administrative Civil Liability (monetary penalty), (3) referral of the matter to the Attorney General for fines or injunction or both, and (4) revocation of a permit or license. In some cases, a violation may result in only one type of action, and in other cases, a violation could result in more than one type of action. What conditions should be present before the State Water Board considers imposing each of the potential enforcement options?

Absent from consideration, however, is a discussion of the underlying legal basis for imposing the various enforcement mechanisms. Specifically, recent SWRCB enforcement activities have blurred the line between violations of terms or conditions contained in state-issued water rights and those that involve diversion of surface water

¹ Somach Simmons & Dunn has also submitted comments along with a consortium of engineering and law firms in response to the State Water Resources Control Board's (SWRCB) Revised Notice regarding its Water Right Enforcement Workshop. By this letter, Somach Simmons and Dunn is providing additional comments not specifically raised in the letter submitted by the consortium.

without a basis of right. The Water Code and SWRCB regulations and guidance documents provide that violations of the terms and conditions of a state-issued water right may be subject to a Cease and Desist Order, while violations that involve diversions of surface water without a basis of right are additionally subject to Administrative Civil Liability. Certain recent SWRCB enforcement actions, however, have impermissibly attempted to impose Administrative Civil Liability for alleged violations of terms and conditions contained in state-issued water rights.²

The SWRCB has the authority to impose administrative civil liability pursuant to Water Code section 1052. Specifically, Water Code section 1052(b) provides the SWRCB may impose civil liability pursuant to section 1055 for a "trespass." Water Code section 1055(a) defines trespass as "[t]he diversion or use of water subject to this division other than as authorized in this division . . ." Water Code section 1831 distinguishes between a "trespass," as defined in Water Code section 1052, and a "violation or threatened violation of . . . any term or condition of a . . . license." (compare Water Code, § 1831(d)(1) with § 1831(d)(2).) Through Water Code section 1831, the Legislature captured two distinct circumstances: a "trespass;" and a violation of a term or condition in a state-issued water right.³

California Code of Regulations, title 23, section 821 provides that,

"if, after investigation, the board's staff finds that a violation of the terms and conditions of any permit or license has occurred which might be cause for enforcement action by the board, the matter may be referred to the board for hearing in accordance with the provisions of Water Code Sections 1410 et seq., 1675 et seq., or 1825 et seq."

² The various SWRCB "Enforcement Teams" do not always seek Administrative Civil Liability where there is an alleged violation of a term or condition in a state-issued water right. (See e.g. Enforcement Team's Closing Brief, In the matter of Delta Salinity Draft Cease and Desist Orders and Water Quality Response Plan Hearing, dated December 12, 2005, p.12, fn12.)

³ The difference between a "trespass" and a violation of a term or condition in a state-issued water right is also recognized in Water Code section 1538, adopted in 2003 as part of the new annual water right fee statutes. Water Code section 1538 provides that where the SWRCB has

"determined that there has been a violation of the prohibition against the unauthorized diversion or use of the water subject to this division, the [SWRCB] may impose an additional liability in the amount of any annual fees that would have been required under this division is the diversion or use had been authorized by a permit or license to appropriate water."

A water right holder who is not complying with the terms or conditions of a state-issued water right is already subject to the annual fees imposed by the SWRCB. This provision reinforces that the "unauthorized" diversion or use of water, a "trespass," occurs where one diverts without a water right and not where one is not in strict compliance with the terms or conditions of a valid water right.

Water Code sections 1410 et seq. and 1675 et seq. address the revocation of permits and licenses, and Water Code section 1825 et seq. addresses cease and desist orders. If, after a cease and desist order is actually adopted, a party fails to comply with a cease and desist order, the board may impose civil liability. (Water Code, § 1845(b)(3).) Thus, there is no basis, either in the Water Code or in the SWRCB's regulations, to impose civil liability for an alleged violation of a condition of a license without first obtaining a cease and desist order.

In addition to the foregoing, the SWRCB's own publication, styled "Information Pertaining to Investigating Water Right Complaints in California, February 2005," (Investigating Water Rights) explains the difference between violations of a term or condition in a permit or license, and the "unauthorized diversion" of water. That document provides as follows:

Authority of the SWRCB

The SWRCB has the authority to investigate the following types of complaints:

- Violation of Permit/License Terms – A complaint may be filed if the holder of a water right permit or license issued by the SWRCB is not complying with the terms and conditions of the permit or license. The Division will investigate the allegations to ensure that the water user complies with all terms and conditions of the water right.
- Unauthorized Diversion – A complaint may be filed if a water user does not appear to have a valid water right. The Division will investigate to determine whether the SWRCB has issued a permit or license, or whether the water user may have riparian, pre-1914, or other type of water right. If Division staff determines that the water user does not have a valid water right, action will be taken to insure that a valid right is acquired or that the person stops diverting the water. (Investigating Water Rights, p.2.)

The "Possible Actions" section of this publication provides that the "SWRCB may issue civil liabilities . . . against anyone who diverts water without a proper water right." (Investigating Water Rights, p.7.) To the extent a party is violating the terms of conditions of a state-issued water right, the publication explains that the water right holder may be subject to a Cease and Desist Order. (Investigating Water Rights, p.8.)

The SWRCB's Enforcement Workshop must address this fundamental underlying issue and clearly define the possible enforcement actions water right holders may face.

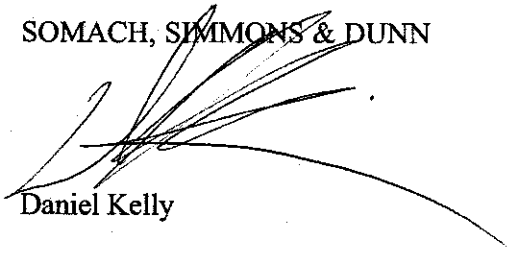
In addition to the foregoing, the SWRCB's Enforcement Workshop should address SWRCB procedural practices and policies in enforcement proceedings. This discussion should include and address the practices found to violate constitutional rights,

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as determined by the Sacramento Superior Court in *Morongo Band of Mission Indians v. State Water Resources Control Board*, Sacramento Superior Court Case No. 04CS00535. In addition, the SWRCB must develop and make public a consistent and clear policy regarding the identification of the Prosecution Team in enforcement actions and their separation from those on the Hearing Team. This discussion should include whether and to what extent it is appropriate to allow subordinate staff members to participate as members of the Hearing Team where senior staff, who sometimes supervise those on the Hearing Team, are members of the Prosecution Team.

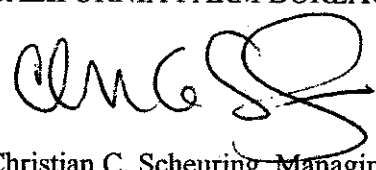
Very truly yours,

SOMACH, SIMMONS & DUNN



Daniel Kelly

CALIFORNIA FARM BUREAU FEDERATION



Christian C. Scheuring, Managing Counsel
Natural Resources and Environmental Division